No. 16,393

IN THE

United States Court of Appeals

For the Ninth Circuit

DAVID NAUMU,
Appellant,

vs.

TERRITORY OF HAWAII,
Appellee.

Upon Appeal from the Supreme Court for the Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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ARGUMENT OF THE CASE.

A. THIS COURT HAS JURISDICTION NOT ONLY TO HEAR THE CAUSE, BUT TO DECIDE ALSO WHETHER THE HAWAII SUPREME COURT WAS IN ERROR IN NOT HOLDING THE STATUTE VOID FOR UNCERTAINTY AND ALSO IN ITS INTERPRETATION THEREOF.

Although appellee, in its answering brief, talks in terms of the jurisdiction of this Honorable Court, what it apparently means is that the scope of review of this Court is a limited one as applied to appellant's first specification of error.

Apparently there is no real dispute as to the jurisdiction of this Court to review the cause. Appellee concludes its brief by intimating that the constitu-

tional question was raised only for the purpose of giving this Court jurisdiction, a conclusion no doubt arrived at by the brevity of appellant's argument thereon, apparently a conclusive criterion according to appellee, judging from the length of its answering brief.

Whether or not a bona fide constitutional question has been raised is for this Court to determine from its evaluation of the statute and applicable authorities cited. And if there is such a question raised it is undisputed that it may also review the question posed by appellant's first specification of error. *Municipality of Rio Piedras v. Serra, Garabis & Co., Inc.,* 65 F. 2d 691 (1933).

Insofar as the scope of review of this Court is concerned as applied to the first specification of error, it is admitted that deference must be given to the interpretation of the Hawaii Supreme Court of Section 11343 of the Revised Laws of Hawaii, 1945. As stated in *Pae v. Stevens,* 256 F. 2d 208 (1958):

> ". . . The instant decision must be accepted insofar as it is in conformity with the Constitution and applicable statutes of the United States *and is not patently erroneous in statement or application of governing principles. . . .*" (Emphasis added.)

What is here urged is that the Hawaii Supreme Court did not merely err in fellowing the minority rule in its interpretation of our "gambling" statute, but that it committed a manifest, fundamental error in arriving at its decision. It did not attempt interpreta-

tion of said statute by examination of its language and the language of related statutes (*Territory v. Uyehara,* 42 Haw. 184 (1958)) in plain disregard of statutory mandates of construction. *Revised Laws of Hawaii, 1955,* Sections 1-17, 1-18, and 1-21. It is submitted that failing to do so, it committed manifest error.

As indicative of its attitude toward its contention, appellee has argued for 36 pages on what it deems an *arguendo* question.

B. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT THE CHARGE STATED FACTS SUFFICIENT TO CONSTITUTE A VIOLATION OF SECTION 11343 OF THE REVISED LAWS OF HAWAII 1945.

Without expressly indicating, appellee has substituted another issue than argued by appellant under its first specification of error. While we freely admit that this specification turns on the interpretation to be given Section 11343, *supra,* we do not admit to the propriety of appellee's narrowing of the issue stated and argued upon by appellant in its brief without first showing wherein appellant erred in its statement of the issue involved.

In its brief appellant argues that the majority rule was that "anything of value", or some similar phrase, excluded "free games" played on pin ball machines, that said phrase was ambiguous even standing alone and was certainly so when compared with other language of Section 11343, *supra,* and that the Hawaii Supreme Court should then have attempted construc-

tion of the said section using statutory guides to construction as well as other well-recognized guides.

Appellant called attention to the use of the phrase "anything representative of value", inviting comparison with "anything of value", quoted from other Hawaii statutes using similar phraseology, invoked certain well-recognized rules of construction and concluded that Section 11343, *supra,* could not be interpreted to penalize pin ball machine games where free games only were awarded.

What apparently appellee has done is to argue that a free game won on a pin ball machine is "anything of value" and that a pin ball game is "any other game" within the meaning of Section 11343, *supra.* In support therefor, it has cited cases using phraseology equivalent to "anything of value", argued that cases favorable to appellant can be distinguished, submitted dictionary definitions of "value" and indicated that Section 11343, *supra,* is the result of several amendments.

Not a word was said as to whether "anything representative of value" differs from "anything of value", whether a pin ball machine game is a "banking" game, and whether use of phraseology in other Hawaii statutes using phraseology substantially equivalent to "anything of value" tended to throw light on the meaning to be given Section 11343, *supra,* as a whole.

In fact, the language of the very statute in issue was carefully skirted by appellee. While cases from other jurisdictions were liberally offered, not a single

one was offered interpreting a statute having language like Section 11343, *supra,* wherein apparently different standards of "value" are used depending on whether a "game" was specifically enumerated or not.

While appellant does not believe that the issue involved has been squarely met, it does not admit that appellee is correct even on its own narrower issue.

Further, appellant does not concede to the propriety of factual occurrences being stated not contained in the agreed statement of facts or not judicially noticeable, nor that dictionary meanings providing for every possible contingency are helpful, and neither does appellant concede that citation of predecessor statutes to Section 11343, *supra,* have any bearing on the issue involved, in the absence of a clearer showing that the changes threw light on the problem herein. While appellant is now convinced that gambling is an evil, it is not convinced that there are not greater evils extant, and that legal briefs are proper media for delivery of sermons.

For the reasons given herein and in its opening brief, appellant submits that it has shown that the Hawaii Supreme Court has committed manifest error in holding that the charge herein stated facts sufficient to constitute a violation of Section 11343 and that appellee in its answering brief has not shown otherwise.

C. THE SUPREME COURT OF THE TERRITORY OF HAWAII ERRED IN RULING THAT SECTION 11343 OF THE REVISED LAWS OF HAWAII, IS NOT VIOLATIVE OF APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT SAID STATUTE IS VAGUE, INDEFINITE AND UNCERTAIN.

Again, as with its discussion of the first specification of error, appellee has misconceived appellant's argument on the second specification of error. In its brief appellant cited several cases for the general propositions therein stated, and further stated that in every case the reviewing Appellate Court has looked to the statutory language itself along with related statutes and made a determination whether fair notice has or has not been given of prohibited conduct.

In its answering brief, appellee again goes on a case-examining spree and, again has failed to cite one case involving the same language. Paradoxically, it urges for a strict construction of Section 11343 in one breath and then in the other breath states that Courts should adopt that construction which would save the statute. As before, appellee has demonstrated that cases cited and quoted by appellant are not in point, a proposition already admitted. Notwithstanding, appellee has countered with more cases without any admission that they are not in point. Apparently its theory is that more cases not in point will prevail over less cases not in point. What appellee has not done is to examine statutory language and the factual situation involved as appellant has done, and as this Honorable Court must do and apply them to the general principles derived from those cases.

The extent of the confusion in appellee's mind is illustrated by what it states on page 49 of its brief, in substance that appellant is strenuously contending that a pin ball machine game is neither a game specifically enumerated in Section 11343, *supra,* or "any other game". Appellant admits it is one or the other. It admits confusion, however, as to which it is. The Hawaii Supreme Court in *Territory v. Uyehara, supra,* somewhat gratuitously, stated that it is a "banking" game, something we do not intend to dispute, for then the relevant inquiry is not whether a "free game" is "anything of value" but whether it is "anything representative of value". The point of our discussion there as with other subjects is that there is considerable uncertainty in determining just what is prohibited by Section 11343, *supra.*

For the reasons stated in our opening brief, appellant submits that Section 11343, Revised Laws of Hawaii, 1945, if construed to include free games played on pin ball machine games within its ban, is unconstitutional, because too vague, indefinite and uncertain according to traditional concepts of due process of law.

CONCLUSION.

For the reasons hereinabove set forth appellant respectfully submits that the judgment and sentence of the Courts below should be reversed.

Dated, Honolulu, Hawaii,
October 1, 1959.

Respectfully submitted,
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Of Counsel.